

The Use of Pretrial Diversion Programs in Spouse Abuse Cases: A New Solution to an Old Problem

I. INTRODUCTION

The problem of domestic violence is the subject of increasing national concern. The extent of domestic violence is difficult to ascertain, primarily because of reluctance within the family unit to publicize conflicts. The limited statistical evidence that is available is sparse and admittedly incomplete, but it does indicate that one form of domestic violence, spouse abuse, occurs once every eighteen seconds in the United States.¹ Legislative and judicial bodies, as well as social agencies, experiment with a variety of methods to combat this domestic violence epidemic. These "solutions" range from counseling for the victim, offender, or family, to the more recent increase in criminal prosecutions of the abuser. This Note discusses and recommends a program that takes the best from these methods in an effort to effectively address domestic violence.

This Note specifically addresses domestic violence between spouses, former spouses, and unmarried couples living in the same household. The term spouse is used regardless of the legal status of the couple. Although husband abuse occurs, wife abuse is a more common problem.² Consequently, this Note discusses spouse abuse from the female victim's perspective. Most of the principles discussed, however, can also be applied to the battered husband.³ This Note first considers the problem of spouse abuse⁴ generally, its recognition, and initial attempts to deal with the problem. Following a brief review of formal pretrial diversion and its recent uses, the propriety of pretrial diversion in the prosecution of spousal abuse cases is considered. Finally, this Note discusses the circumstances under which pretrial diversion is most effective in spouse abuse cases.

A. *The Recognition of the Spouse Abuse Problem and Initial Attempts at Solution*

Although interspousal violence is a pervasive problem, it is one of the most neglected. Society and the legal justice system have shown a

1. Moore, *Editor's Introduction* in BATTERED WOMEN 14 (D. Moore ed. 1979).

2. *Id.* at 12.

3. *Id.*

4. The terms "abuse," "assault," or "battering" represent any acts carried out with the intention of, or perceived intention of, physically injuring one's spouse. The problem of mental abuse is beyond the scope of this Note.

general unwillingness to invade the family unit and involve themselves in such conflicts. Unfortunately, this attitude, based primarily on traditional privacy considerations, overlooks the problem.

In the last two decades, the problem of spouse battering has received increased attention. Initial attempts at dealing with spouse abuse, however, reflected the view that these occurrences of violence were not real crimes, and the courts should not interfere with the sanctity of the family. Early efforts included hotlines and shelters for battered women.⁵ These efforts increased the attention given to the problems of the battered spouse, yet did little more than provide on the spot relief or advice for a limited number of battered women.⁶

Since 1970, there has been a significant increase in spouse abuse research, and a corresponding increase in the attention given to the results of that research. This is largely due to the women's movement, which has focused attention on all aspects of the oppression of women, and has begun to change the cultural norms supporting abuse.⁷ Discouragingly, this change in social views has been slow.

Martha and Henry Fields state in their 1973 article⁸ that the criminal justice system is ineffective in achieving deterrence, incapacitation, prevention, retribution, or rehabilitation in spousal abuse cases. They also assert that the dynamics of violent intimate relationships "place them more appropriately within the bailiwick of the helping professions."⁹ Unfortunately, the beginning of public, legislative, and judicial awareness of domestic violence between spouses in the 1970s reflected much the same view. Treating the family or couple together instead of focusing on the batterer and his violent behavior was a typical initial solution aimed at spousal abuse. One of the earliest studies in the spousal violence field examined projects which developed new ways to handle domestic cases.¹⁰ The author of this study, Raymond Parnas, favors using informal prosecution hearings, information and referral programs, arbitration, peace bonds, and family courts in order to avoid prosecution of family cases, thereby channeling such cases to social service personnel

5. L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 1 (1981).

6. Shelters do, however, provide vital and essential support services for battered women such as housing, emotional assistance, and a safe place from which to pursue legal remedies. U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 96 (1982) [hereinafter RULE OF THUMB].

7. Couch, *Research on Wife Abuse: A Scan of Literature*, in ABUSE OF WOMEN: LEGISLATION, REPORTING AND PREVENTION 1 (J. Costa ed. 1983).

8. Field & Field, *Marital Violence and the Criminal Process: Neither Justice nor Peace*, 47 SOC. REV. 221, 227 (1973).

9. *Id.*

10. Parnas, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. L. BULL. 733 (1973).

and psychologists. The study points out that prosecutors are ill-equipped to perform psychoanalysis, and, therefore, unable to deliver the primary counseling services needed by violent families.¹¹ Although the spousal violence problem was recognized, it was treated in a noncriminal manner and channeled away from the traditional criminal justice system.

By 1977, commentators were addressing the problems generated by the treatment for domestic violence in the 1970s. An article by Sue Eisenburg and Patricia Micklow took a different approach from previous studies.¹² The Eisenburg-Micklow Article criticized crisis intervention and arbitration techniques as relying too heavily upon mediation and conciliation "with the effect of depreciating the severity of the complaints," and translating "patterns of repetitive, serious, violent behavior into social disturbances, family spats, or quarrels."¹³ Suggested alternatives included improved reporting of domestic violence calls to facilitate the identification of serious cases, limited use of pretrial detention, explicit prosecution guidelines on the exercise of discretion in filing charges, and judicial insistence on complete records in spouse abuse cases.¹⁴

During the last decade there has been a trend toward reducing the court time spent on "minor disputes" by instituting mediation programs.¹⁵ The prevailing attitude toward domestic violence as a less serious crime than one perpetrated upon a stranger resulted in mediation programs receiving the bulk of domestic abuse cases. During mediation, both parties are asked to pinpoint sources of frustration in their relationship, and to suggest solutions to the problems they identify.¹⁶ This process may produce a written agreement, possibly sealed by the court, but it is generally not enforceable.¹⁷

Mediation programs represent one of the more recent trends in the treatment of spousal violence. A strong argument can be made in favor of mediation if the only goals are reconciliation and keeping the family unit together. Unfortunately, the balance of power in most violent relationships conflicts with the underlying concept of mediation—that of two equal parties meeting with a neutral third party to work out differences. Generally, both the victim and the abuser blame the victim

11. *Id.* at 759.

12. Eisenburg & Micklow, *The Assaulted Wife: Catch 22 Revisited*, 3 WOMEN'S RIGHTS L. REP. 138 (1977). See *supra* text accompanying note 10.

13. Eisenburg & Micklow, *supra* note 12, at 160.

14. *Id.* at 161.

15. L. LERMAN, *supra* note 5, at 66 (citing R. COOK, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT 1-7, (1980) (available from the National Institute of Justice)).

16. L. LERMAN, *supra* note 5, at 66.

17. *Id.*

for the violence, and mediation provides yet another opportunity for the batterer to explain exactly what it is about the victim's behavior that provokes him to beat her.¹⁸ "Mediation allows the husband to negotiate a change in his wife's behavior and fails to send a message to the batterer that he is responsible for his conduct and that his conduct is wrong."¹⁹ Moreover, "mediation may actually perpetuate battering by protecting the batterer from criminal sanctions."²⁰ The batterer's belief in his right to beat his spouse is reinforced by absolving him of blame for his actions and insulating him from social stigma.²¹

Many advocates "argue other options are better at reducing violence than mediation."²² These advocates urge that "the relegation of domestic violence cases to mediation assumes the injuries involved are trivial,"²³ and the message communicated to a battered spouse when denied the right to see a judge is that the spouse has no enforceable right not to be beaten.²⁴ Further, even if mediation does result in an enforceable agreement prohibiting violence, it may not be helpful in deterring the abuser since the violence is already illegal.

While mediation may not be the preferred response to spousal violence, there are instances where mediation is the only option available to deal with the abusive situation. A victim may not desire or may be afraid to file charges against her attacker because "she will lose control over the use of less drastic measures, and because she fears the public exposure of prosecution."²⁵ Additionally, the abuser may perceive mediators as less threatening than prosecutors or judges, and thus be less defensive and more willing to seek counseling.²⁶ It may be that prosecution is not a viable option because evidence is insufficient to support a conviction. Thus, mediation programs permit some response to the violence where there otherwise is none.²⁷

Civil action by the battered spouse is another possible response to the domestic abuse problem.²⁸ Traditionally, interspousal tort suits were unavailable for domestic abuse due to interspousal tort immunity.²⁹

18. *Id.* at 69.

19. Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases*, 2 LAW & INEQUALITY 493, 518 (1984).

20. *Id.*

21. *Id.*

22. L. LERMAN, *supra* note 5, at 68.

23. *Id.*

24. Fields, *Wife Beating: Government Intervention Policies and Practices*, in U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY 252 (1978).

25. N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 214 (1987).

26. *Id.* at 216.

27. *Id.* at 217.

28. Note, *Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform*, 1983 U. ILL. L. REV. 261, 263 (1983).

29. *Id.*

Today, civil action is more feasible because most jurisdictions reject all arguments favoring this immunity and construe the Married Women's Acts as authorizing a tort action by either spouse against the other.³⁰

Civil suits for personal injury are suggested as an acceptable alternative to criminal prosecutions by Martha and Henry Fields. The authors suggest tendering civil suits for personal injury as an alternative to the ineffective criminal justice system.³¹ Even though civil action is one avenue of recourse available to the battered spouse, it does not provide a complete remedy. The abused party may receive compensation for injuries through civil suit, however, tort liability does not provide the necessary physical protection for spouses,³² nor does it bring the violence properly within the reach of criminal law.

B. Spouse Abuse and the Criminal Justice System

Although mediation programs are generally used and accepted, the trend is toward treating these offenses in a more criminal manner. The use of protective orders against the batterer, warrantless and immediate arrest statutes, and more frequent prosecution of batterers demonstrates that marital violence is being treated more seriously, even if not yet treated on par with assaults between strangers.

30. The following 29 states have abolished interspousal tort immunity: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, and Wisconsin. See *Penton v. Penton*, 223 Ala. 282, 135 So. 481 (1931); *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963); *Leach v. Leach*, 227 Ark. 599, 300 S.W.2d 15 (1957); *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70 (1962); *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935); *Silverman v. Silverman*, 145 Conn. 663, 145 A.2d 826 (1958); *Lorang v. Hays*, 69 Idaho 440, 209 P.2d 733 (1949); *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972); *Layne v. Layne*, 433 S.W.2d 116 (Ky. 1968); *United States v. Haynes*, 445 F.2d 907 (5th Cir. 1971) (Louisiana); *Lewis v. Lewis*, 351 N.E.2d 526 (Mass. 1976); *Mosier v. Carney*, 376 Mich. 532, 138 N.W.2d 343 (1965); *Beaudette v. Franna*, 285 Minn. 366, 173 N.W.2d 416 (1969); *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Morin v. Letourneau*, 102 N.H. 309, 156 A.2d 131 (1959); *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970); *Maestas v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975); *Weicker v. Weicker*, 28 A.D.2d 138, 283 N.Y.S.2d 385 (1967); *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941); *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191, 242 N.W. 526 (1932); *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938); *Fowler v. Fowler*, 242 S.C. 252, 130 S.E.2d 568 (1963); *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941); *Bounda v. Caudle*, 560 S.W.2d 925 (Tex. 1977); *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973); *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971); *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 771 (1962); *Bodenhagen v. Farmers Mut. Ins. Co.*, 5 Wis. 2d 306, 95 N.W.2d 822 (1959). Along with Illinois' recent enactment of the Domestic Violence Act, the legislature provided that spouses can sue the other spouse, but only for intentional torts resulting in physical harm. ILL. REV. STAT. ch. 40, para. 1001 (1981).

31. *Id.*

32. *Id.* at 267.

1. *Police.* Police handling of domestic violence cases is fundamental to successful prosecution and deterrence of spouse batterers. Although a victim of domestic violence may file a private criminal complaint or seek civil relief, in the vast majority of spouse abuse cases, a police officer is the first, if not the only representative of the justice system with whom a battered spouse has any contact.³³ Unfortunately, police are reluctant to file reports or to take batterers into custody. This is partly because so few domestic cases result in prosecution and police believe their time could be better spent. Police also traditionally view most incidents of spouse abuse as private matters that are best resolved by the parties themselves.³⁴ There may also be difficulties in finding a legal basis for such arrests.³⁵

One legal constraint on police arrests of batterers is the fourth amendment.³⁶ The police must have probable cause to believe a crime has been committed by the person arrested.³⁷ State law cannot abolish this requirement, however, within the limits of the fourth amendment, the state prescribes the standard for arrest in criminal cases.³⁸ If domestic abuse is treated as a misdemeanor, arrests become even more difficult as most state laws generally permit warrantless arrests when there is probable cause that a felony has been committed but only upon witnessing the commission of a misdemeanor.³⁹ These laws discourage arrests in most domestic abuse cases because injury is often not visible, and police rarely witness the assault.⁴⁰ New warrantless arrest statutes,⁴¹ which allow arrests when violence is likely, are an important step in triggering the criminal justice system to reduce violence.⁴² Warrantless arrests mean immediate arrests are possible, further injury to the victim is avoided, and violent behavior is punished.⁴³

There are negative aspects of a more frequent arrest policy. An arrest may make the offender more angry and abusive under some circumstances,⁴⁴ or may result in fewer reported incidents if the victim does

33. RULE OF THUMB, *supra* note 6, at 12.

34. *Id.* at 21.

35. See generally L. LERMAN, *supra* note 5, at 121-23.

36. "[N]o Warrants shall issue, but upon probable cause...." U.S. CONST. amend. IV.

37. L. LERMAN, *supra* note 5, at 121.

38. *Id.* at 124.

39. *Id.*

40. *Id.*

41. *Id.* at 132.

42. *Id.* at 126.

43. See generally *id.* at 124-29. A majority of states allow warrantless arrests if probable cause is present, while a growing minority of state statutes provide for mandatory arrests in certain domestic violence situations. Lerman, Landis & Goldzweig, *State Legislation on Domestic Violence*, 4(7) RESPONSE TO VIOLENCE IN THE FAMILY 10, 11 (1981).

44. Comment, *Immediate Arrest in Domestic Violence Situations: Mandate or Alternative*, 14 CAP. U.L. REV. 243, 246 (1985).

not want to see the batterer arrested and prosecuted.⁴⁵ Additionally, more frequent arrests without a resulting prosecution weakens the message that domestic violence is a crime.⁴⁶

Those dangers, however, are outweighed by the benefits of a more frequent arrest policy. An increase in arrests will lead to more frequent prosecution of domestic violence cases,⁴⁷ an increase in the likelihood of victim cooperation and courage to correct her situation,⁴⁸ and will "communicate to the parties [involved] that the abuser has committed a crime and the victim has a right not to be beaten."⁴⁹

2. *Prosecution.* "For centuries prosecutors have assumed that domestic violence is a minor problem, that for a man to strike his wife is a legitimate exercise of his authority to discipline her, that women provoke the beatings they receive, or that they enjoy them."⁵⁰ Traditional attitudes toward crime and family life encourage prosecutors to regard spouse abuse as outside their jurisdiction. This prosecutorial response is reinforced by negative experiences in prosecuting spouse abuse cases.⁵¹ The institutional process leads prosecutors to prefer expending their efforts on cases in which the chance of conviction and serious penalty are likely, and to seek diversion or dismissal of cases considered poor risks.⁵² Domestic abuse cases are poor risks for conviction. This is due to a lack of evidence to support one or more elements of the offense.⁵³ The offense is often committed behind closed doors and testimonial evidence by the victim is often not credible to the jury.⁵⁴ The victim may also be uncooperative,⁵⁵ or may decide to drop charges against the offender.⁵⁶ With these factors in mind, it is not surprising that the rate of prosecution and conviction decreases sharply when there is a relationship between the alleged assailant and the victim.⁵⁷

Nevertheless, there are many reasons supporting prosecution as the appropriate course in domestic abuse cases. "The prosecutor exerts considerable influence over the police, sending officers formal and informal messages on the content of criminal statutes, the priority

45. *Id.* at 259.

46. *Id.* at 255.

47. L. LERMAN, *supra* note 5, at 119.

48. *Id.* at 120.

49. *Id.* at 121.

50. *Id.* at 17.

51. *Id.*

52. RULE OF THUMB, *supra* note 6, at 23.

53. *Id.* at 30.

54. Stanko, *Would You Believe This Woman?*, in JUDGE, LAWYER, VICTIM, THIEF 68 (1982).

55. *Id.* at 67.

56. *Id.*

57. RULE OF THUMB, *supra* note 6, at 30.

assigned to various law enforcement problems, and . . . changing policies or guidelines.”⁵⁸ Thus, the willingness of police to arrest batterers becomes a function of the prosecutor’s willingness to follow up those arrests with prosecution. Additionally, the failure of the criminal justice system to enforce the law against batterers via prosecution contributes to the perpetuation of violence within the family⁵⁹ and affirms society’s view of family violence as less serious than crime between strangers.

Fortunately, attitudes of prosecutors are changing and the prosecution of domestic violence is receiving greater attention. In 1978, prosecutors nationwide attended a conference on the prosecution of batterers sponsored by the National Attorney’s Association and The Center for Women’s Policy Studies. The conference report states that the participants agreed that “spouse assault is just as criminal as violent conduct between other people and should not be treated less seriously by the criminal justice system.”⁶⁰ This belief is reflected in the movement away from informal procedures⁶¹ and the increased use of formal criminal charges in domestic assault cases.⁶²

The recognition of spouse abuse as criminal behavior was the first crucial step. At least “a handful of prosecutors around the country have made abuse cases a priority and aggressively prosecute cases involving intimates.”⁶³ Prosecutors in Seattle, Santa Barbara, Los Angeles, Philadelphia, New York, among others, have adopted procedures that reduce pressures on the complainant, and reduce case attrition.⁶⁴ Prosecutors are beginning to regard spouse abuse as a crime against the state, and view the decision to prosecute an abuse case as the prosecutor’s responsibility, not the responsibility of the victim.

II. PRETRIAL DIVERSION

A. Introduction

Although the problem of domestic violence is an old one, formal pretrial diversion of criminal offenders is somewhat new. The term “diversion” is defined as the channeling of criminal defendants into rehabilitative programs after a criminal complaint has been filed.⁶⁵ The

58. *Id.* at 23.

59. L. LERMAN, *supra* note 5, at 13.

60. *Id.* at 5 (citing T. Fromson, *Prosecutor’s Responsibility in Spouse Abuse Cases* (1980) (on file at the Center for Women Policy Studies)).

61. Mediation and crisis intervention, for example. L. LERMAN, *supra* note 5, at 6.

62. *Id.*

63. *Id.* at 33.

64. *Id.* at 33-34.

65. Laszio & McKean, *Court Diversion: An Alternative for Spousal Abuse Cases*, in U.S. COMM’N ON CIVIL RIGHTS, *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 330 (1978).

term implies a halting or suspending of formal criminal proceedings against the alleged criminal perpetrator in favor of a noncriminal proceeding which, if successful, is the final disposition of the criminal offense.⁶⁶

The pretrial . . . "diversion" program represents one of the most promising correctional treatment innovations in recent years. Adaptable both to adult and juvenile correctional populations, the concept has received increasing recognition and endorsement as a rehabilitative technique for early and youthful offenders The technique is to be distinguished from informal diversion practices . . . in that pretrial [diversion] referrals are based on (i) formalized eligibility criteria, (ii) required participation in manpower, counseling, job placement, and educational services for defendants placed in the programs, and (iii) utilization of a real alternative to official court processing, *i.e.* dismissal of formal charges for successful participants.⁶⁷

Pretrial diversion programs are based on the belief that not every criminal violation warrants a formal courtroom prosecution.⁶⁸ The subjects of diversion have fallen into two general groups. One such group is comprised of persons charged with offenses of arguably dubious criminality, such as drug abuse and juvenile offenses.⁶⁹ A second group includes persons for whom ordinary criminal processing may be ineffectual, such as misdemeanants, juveniles, and domestic assaulters.⁷⁰ The rationale for using diversion in both groups is the avoidance of costly criminal processing "of questionable benefit to the individual and society, while maintaining social controls through services aimed at altering behavior."⁷¹ Thus, through pretrial diversion, the benefits of rehabilitative social services can be received without allowing the offender to completely escape criminal culpability.

In the past, the term "diversion" has been used for programs designed to completely remove cases from the traditional court process, *i.e.* giving the violence no criminal treatment at all. These diversion programs included mediation, arbitration, and family counseling. This Note refers to diversion in a different context: the diversion of the spouse batterer into some type of rehabilitative process after the filing of a criminal complaint, but prior to trial, conviction, or adjudication. The process is not a channeling of the offender away from the traditional court proc-

66. *Id.* (citing report of the Corrections Task Force of the National Commission on Criminal Justice Standards and Goals (1973)).

67. Hopkins, *Foreword* to NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, MONOGRAPH ON LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS at i (1974).

68. Annotation, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative*, 4 A.L.R. 4th 147, 151 (1981).

69. Robertson, *Pretrial Diversion of Drug Offenders: A Statutory Approach*, 52 B.U.L. REV. 335, 335 (1972).

70. *Id.*

71. *Id.*

essing of criminal acts, but a diversion process working in conjunction with the trial court. The courtroom is the starting point in many cases, and remains the final forum for unsuccessful diversion cases. What is suggested is the use of pretrial diversion in spousal abuse cases in the same way it is used in diversion of other criminal offense cases. Diversion should be used when it appears to be a more effective means of rehabilitation through the use of existing social service agencies. The diversion cannot be permitted to stray too far from the traditional legal system or it will not prohibit batterers from escaping criminal culpability for continued abusive behavior.

B. Is Diversion an Appropriate Means of Dealing with Spouse Abuse?

Placing aside the initial difficulties of bringing a domestic violence case to the prosecution stage, such as police nonarrest and lack of formal complaint filing, there are other characteristics of the spouse assault crime that limit its applicability to typical pretrial diversion statutes. Section 2935.36 of the Ohio Revised Code⁷² provides for the

72. OHIO REV. CODE ANN. § 2935.36 (Anderson 1980) provides as follows:

- (A) The prosecuting attorney may establish pretrial diversion programs for adults who are accused of committing criminal offenses and whom he believes will probably offend again. The programs shall be operated pursuant to written standards approved by the presiding judge or, in courts with only one judge, the judge of the court of common pleas and shall not be applicable to any of the following:
 - (1) Repeat offenders or dangerous offenders, as defined in section 2903.06, 2903.07, 2905.04, 2907.05, 2907.21, 2907.22, 2907.31, 2907.32, 2907.34, 2911.31, 2919.12, 2919.13, 2919.22, 2921.11, 2921.12, 2921.32, 2923.04, or 2923.20 of the Revised Code, with the exception that the prosecuting attorney may permit persons accused of such offenses to enter a pre-trial diversion program, if he finds any of the following:
 - (a) The accused did not cause, threaten, or intend serious physical harm to any person;
 - (b) The offense was the result of circumstances not likely to recur;
 - (c) The accused has no history of prior delinquency or criminal activity;
 - (d) The accused has led a law-abiding life for a substantial time before commission of the alleged offense;
 - (e) Substantial grounds tending to excuse or justify the offense;
 - (3) Persons accused of a violation of Chapter 2925. or 3719. of the Revised Code;
 - (4) Drug dependent persons or persons in danger of becoming drug dependent persons, as defined in section 3719.011 [3719.01.1] of the Revised Code.
- (B) An accused who enters a diversion program shall:
 - (1) Waive, in writing and contingent upon his successful completion of the program, his right to a speedy trial, the preliminary hearing, the time period which the grand jury must review the offense with which he is charged and to the conditions of the diversion program established by the prosecuting attorney.
- (C) The trial court, upon the application of the prosecuting attorney, shall order the release from confinement of any accused who has agreed to enter a pre-trial diversion program and shall discharge and release any existing bail and release any sureties on recognizances and shall release the accused on a recognizance bond conditioned upon the accused's compliance with the terms of the diversion program. The victim of the crime and the arresting officers shall have the

pretrial diversion of criminal offenders. Ohio's statute is representative of those state statutes with diversion provisions, most of which typically provide for prosecutorial discretion regarding the criminal defendants' eligibility for diversion programs.⁷³ The Ohio statute prohibits certain types of offenders from using the diversion process. Those prohibited

opportunity to file written objections with the prosecuting attorney prior to the commencement of the pre-trial diversion program.

- (D) If the accused satisfactorily completes the diversion program, the prosecuting attorney shall recommend to the trial court that the charges against the accused be dismissed, and the court shall, upon recommendation of the prosecuting attorney, dismiss the charges. If the accused chooses not to enter the prosecuting attorney's diversion program, or if the accused violates the conditions of the agreement pursuant to which he has been released, he may be brought to trial upon the charges in the manner provided by law, and the waiver executed pursuant to division (B)(1) of this section shall be void on the date the accused is removed from the program for the violation.

73. See also FLA. STAT. aa 944.025 (1979) which provides as follows:

- (1) The department shall supervise pretrial intervention programs for persons charged with a crime, before or after any information has been filed or an indictment has been returned in the circuit court. Such programs shall provide appropriate counseling, education, supervision, and medical and psychological treatment as available and when appropriate for the persons released to such programs.
- (2) Any first offender, or any person previously convicted of no more than one nonviolent misdemeanor, who is charged with any misdemeanor or felony of the third degree is eligible for release to the pretrial intervention program on the approval of the administrator of the program and the consent of the victim, the state attorney, and the judge who presided at the initial appearance hearing of the offender. In no case, however, shall any individual be so released unless, after consultation with his attorney or one made available to him if he is indigent, he has voluntarily agreed to such program and has knowingly and intelligently waived his right to a speedy trial for the period of his diversion. In no case shall the defendant or his immediate family personally contact the victim or his immediate family to acquire the victim's consent under the provisions of this act.
- (3) The criminal charges against an individual admitted to the program shall be continued without final disposition for a period of 90 days from the date the individual was released to the program, if the offender's participation in the program is satisfactory, and for an additional 90 days upon the request of the program administrator and consent of the state attorney, if the offender's participation in the program is satisfactory.
- (4) Resumption of pending criminal proceedings shall be undertaken at any time if the program administrator or state attorney find such individual is not fulfilling his obligations under this plan or if the public interest so requires.
- (5) At the end of the intervention period, the administrator shall recommend:
 - (a) That the end revert to normal channels for prosecution in instances in which the offender's participation in the program has been unsatisfactory;
 - (b) That the offender is in need of further supervision; or
 - (c) That dismissal of charges without prejudice shall be entered in instances in which prosecution is not deemed necessary. The state attorney shall make the final determination as to whether the prosecution shall continue.
- (6) The chief judge in each circuit may appoint an advisory committee for the pretrial diversion program. Said committee shall be composed of the chief judge or his designate, who shall serve as chairman; the state attorney, public defender, and program administrator, or their representatives; and such other persons as the chairman shall deem appropriate. The committee may also include persons rep-

include repeat offenders or persons accused of a violent offense.⁷⁴ These individuals are excluded because public policy compels avoiding risks to the community's safety during the participation period.⁷⁵

Initially, it appears that pretrial diversion is inappropriate for domestic abuse cases because they undoubtedly involve violent offenses and are often repeated occurrences.⁷⁶ Yet, the same reasons that lead to the informal diversion of batterers (noncriminal handling), point to formal pretrial diversion as appropriate. These reasons are: judicial economy, criminal justice resources,⁷⁷ victims' unwillingness to testify resulting in no-win cases,⁷⁸ parties' desire to preserve whatever is left of a marital relationship,⁷⁹ and intrafamily assault cases frequently characterized by the victim and the offender as noncriminal.⁸⁰ The fact that violence occurs in a family setting does not change its criminal character,⁸¹ however, it may affect the level of the participant's commitment to the diversion program and thus facilitate the attainment of program goals. Although the rationale behind the formal diversion of spouse batterers is similar to the justification for use of the earlier informal processes, formal diversion should be more effective in dealing with the abuse problem. Contrary to the more informal diversion tactics such as mediation, formal diversion programs focus on the criminal behavior of the batterer and do not let him share the blame with the victim. Formal programs also have a coercive effect upon the batterer by sending the case back to be prosecuted if the diversion program is not successfully completed.⁸² Furthermore, diversion has an advantage over prosecution because it can be accomplished more swiftly than prosecution, thus taking advantage of the batterer's strong motivation to stop battering during the contrite loving stage.⁸³

resenting any other agencies to which person released to the pretrial intervention program may be referred.

(7) The department may contract for the services and facilities necessary to operate pretrial intervention programs.

74. OHIO REV. CODE ANN. § 2935.36(A)(1) and (2) (Anderson 1980).

75. NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, MONOGRAPH ON LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS 40 (1974) [hereinafter MONOGRAPH].

76. Note, *Domestic Relations, Legal Responses to Wife Battering: Theory and Practice in Ohio*, 16 AKRON L. REV. 705, 738 (1983).

77. Brakel, *Diversion from the Criminal Process: Informal Discretion, Motivation, and Formalization*, 48 DEN. L.J. 211, 223 (1971).

78. *Id.* at 224.

79. R. NIMMER, *DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION* 31 (1974).

80. *Id.*

81. Stallone, *supra* note 19, at 518.

82. Laszio & McKean, *supra* note 65, at 355.

83. Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 325 (1985).

There are, of course, problems with using pretrial diversion in spouse abuse cases. Advocates for battered women disagree regarding the desirability of diversion. Some believe that diversion sanctions under-enforcement of the criminal law.⁸⁴ By consistently diverting domestic violence cases, a message is communicated to the community that the problem is not a serious crime, rather it is a private matter.⁸⁵ Even formal diversion programs will not be effective in cases involving repeat offenders or hardened criminals. Thus, these programs cannot be used as a dumping ground for "minor disputes" without regard to the needs of battered women, the offenders, and society's interest in the censure of domestic violence.⁸⁶ Nevertheless, in cases involving less serious injury or first time offenders, a well planned program of diversion with prosecution deferred may be effective.⁸⁷

The remainder of this Note considers the provisions of some state statutes for the process, the characteristics of particular abuse cases that may or may not make them appropriate for diversion, and the circumstances under which a diversion process can be effective in spouse abuse cases without perpetuating the view that domestic violence is not a serious crime.

C. Current Statutory Programs

A pretrial diversion program may be established by statute, by court rule, or by administrative policy.⁸⁸ Although statutory authority is not required to set up a diversion program, implementation of statewide programs may be facilitated by legislation setting forth procedures for diversion. Such legislation helps keep consistency in the types of defendants admitted into diversion programs, and sets a range within which a prosecutor's discretion must work. Many state statutes establish pretrial diversion programs similar to section 2935.36 of the Ohio Revised Code,⁸⁹ but only a few contain provisions aimed specifically at diversion of spouse batterers.

Legislation on diversion of domestic violence offenders has been passed in Michigan,⁹⁰ Wisconsin,⁹¹ and Arizona.⁹² The Michigan statute⁹³ provides for "probation" after a guilty plea or a finding of guilt by the

84. Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61, 135 (1985) [hereinafter *A Model State Act*].

85. Note, *supra* note 76, at 737.

86. *Id.*

87. *Id.*

88. L. LERMAN, *supra* note 5, at 93.

89. See *supra* text accompanying notes 69-71.

90. MICH. COMP. LAWS ANN. § 769.4a (West 1982).

91. WIS. STAT. ANN. § 971.37 (West 1985).

92. ARIZ. REV. STAT. ANN. § 13.3601 (Supp. 1986).

93. MICH. COMP. LAWS ANN. § 769.4a (West 1982) provides as follows:

court, but prior to the entering of a guilty judgment.⁹⁴ Any further proceedings are deferred while the defendant adheres to the conditions of his "probation," which may or may not include counseling or other conditions.⁹⁵ "Upon the fulfillment of the conditions and the conclusion of the probationary period, the court will discharge the offender and dismiss the proceedings against [him]."⁹⁶ Hence, there is no conviction and no record except those kept for the purpose of determining future eligibility under the diversion statute.⁹⁷

Wisconsin law⁹⁸ provides for the prosecutor to enter into an agreement with the defendant in writing in which the defendant waives his right to a speedy trial, tolls the statute of limitations, and agrees to file monthly reports with the prosecutor certifying his compliance with the

Sec. 4a (1) When a person, who has not been convicted previously of a violation of section 81 or 81a of Act N. 328 of the Public Acts of 1931, as amended, being sections 750.81 and 750.81a of the Michigan Compiled Laws, and the victim of the assault is the offender's spouse, former spouse, or a person residing or having resided in the same household as the victim, pleads guilty to, or is found guilty of, a violation of section 81 or 81a of Act No. 328 of the Public Acts of 1931, as amended, the court, without entering judgment of guilt, and with consent of the accused, may defer further proceedings and place the accused on probation as provided in this section. Upon violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided in this chapter.

- (2) An order of probation entered under subsection (1) may require the accused to participate in a mandatory counseling program. The court may order the accused to pay the reasonable costs of the program.
- (3) Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person. Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.
- (4) There may be only 2 discharges and dismissal under this section with respect to any person. The department of state police shall retain a nonpublic record of an arrest and discharge under this section. This record shall be furnished to a court or police agency upon request for the purpose of showing that a defendant in a criminal action under section 81 or 81a of Act No. 328 of the Public Acts of 1931, as amended, has already once availed himself or herself to this section.

94. *Id.* at § 769.4a(1).

95. *Id.* at § 769.4a(2).

96. *Id.* at § 769.4a(3).

97. *Id.* at § 769.4a(4).

98. WIS. STAT. ANN. § 971.37 (West 1985) provides as follows:

- (1) In this section, "child sexual abuse" means an alleged violation of § 940.203, 940.225 or 944.06 if the alleged victim is a minor and the person accused of, charged with, the violation:
 - (a) Lives with or has lived with the minor;
 - (b) Is nearer of kin to the alleged victim than a 2nd cousin;
 - (c) Is a guardian or legal custodian of the minor; or
 - (d) Is or appears to be in a position of power or control over the minor.
- (m)(a) The district attorney may enter into a deferred prosecution agreement under this section with a person accused of, or charged with, child sexual abuse

diversion agreement.⁹⁹ Either the prosecutor or the defendant can terminate the agreement and proceed with prosecution.¹⁰⁰ Upon completion of the program, the court will dismiss with prejudice all charges.¹⁰¹

In the Arizona statute,¹⁰² the diversion program is unavailable to defendants with a prior criminal record or prior experience with a

or a violation of aa 813.12(8) or aa 940.19(1) or (1m) if the violation constitutes domestic abuse as defined in aa 46.95(1)(a).

(b) The agreement shall provide that the prosecution will be suspended for a specified period if the person complies with conditions specified in the agreement. The agreement shall be in writing, signed by the district attorney or his or her designee and the person, and shall provide that the person waives his or her right to a speedy trial and that the agreement will toll any applicable civil or criminal statute of limitations during the period of the agreement, and, furthermore, that the person shall file with the district attorney a monthly written report certifying his or her compliance with the conditions specified in the agreement. The district attorney shall provide the spouse of the accused person and the alleged victim or the parent or guardian of the alleged victim with a copy of the agreement.

(2) The written agreement shall be terminated and the prosecution may resume upon written notice by either the person or the district attorney to the other prior completion of the period of the agreement.

(3) Upon completion of the period of the agreement, if the agreement has not been terminated under sub. (2), the court shall dismiss, with prejudice, any charge or charges against the person in connection with the crime specified in sub. (1m), or if no such charges have been filed, none may be filed.

(4) Consent to a deferred prosecution under this section is not an admission of guilt and the consent may not be admitted in evidence in a trial for the crime specified in sub. (1m), except if relevant to questions concerning the statute of limitations or lack of speedy trial. No statement relating to the crime, made by the person in connection with any discussion concerning deferred prosecution or to any person involved in a program in which the person must participate as a condition of the agreement, is admissible in a trial for the crime specified in sub. (1m).

(5) This section does not preclude use of deferred prosecution agreements for any alleged violations not subject to this section.

99. *Id.* at § 971.37(1)(1m)(b).

100. *Id.* at § 971.37(1)(1m)(b)(2).

101. *Id.* at aa 971.37(1)(1m)(b)(4).

102. ARIZ. REV. STAT. ANN. § 13.3601 (Supp. 1986) provides as follows:

A. "Domestic violence" means any act which is a dangerous crime against children as defined in 13-604.01 or an offense defined in 13-1201 through 13-1204, 13-1302 through 13-1304, 13-1502 and 13-1602 and 13-2904, subsection A, paragraphs 1, 2, 3 and 6, if the relationship between the victim and the defendant is one of marriage or former marriage or of person of the opposite sex residing or having resided in the same household or if the victim and defendant or the defendant's spouse are related to each other by consanguinity or affinity of the second degree.

B. A peace officer may, with or without a warrant, arrest a person if he has probable cause to believe that domestic violence has been committed and he has probable cause to believe that the person to be arrested has committed the offense, whether such offense is a felony or misdemeanor and whether such offense was committed within or without the presence of the peace officer. The release procedures available under 13-3883, paragraph 4 and 13-3903 are not applicable to arrest made pursuant to this subsection.

C. A person arrested pursuant to subsection B of this section may be released from custody in accordance with the rules of criminal procedure or other applicable statute. Any order of release, with or without an appearance bond, shall include

diversion program.¹⁰³ Similar to the Michigan statute, the diversion occurs after conviction but prior to final adjudication.

In all of the statutes discussed, the prosecutor has wide discretion in deciding which cases should be diverted, limited only by prior conviction or prior diversion experience.¹⁰⁴ Thus, prosecutors play a central role in successful implementation of diversion statutes. More specific eligibility requirements may be helpful in guiding the prosecutor's discretion in determining admittance to the diversion program.¹⁰⁵ This avoids the danger of the program becoming a dumping ground for case overload, and maintains consistency in the types of defendants admitted.

III. WHEN IS DIVERSION APPROPRIATE IN SPOUSE ABUSE CASES?

A. General Diversion Eligibility

Formal pretrial diversion programs are not always appropriate in spouse abuse cases, just as they are not always appropriate in other

pretrial release conditions necessary to provide for the protection of the alleged victim and other specifically designated persons and may provide for additional conditions which the court deems appropriate, including participation in any counseling programs available to the defendant.

- D. When a peace officer responds to a call alleging that domestic violence has been or may be committed, the officer shall inform any alleged or potential victim of the procedures and resources available for the protection of such victim including:
 - 1. An order of protection pursuant to 13)3602 and an injunction pursuant to 25-315.
 - 2. The emergency telephone number for the local police agency.
 - 3. Telephone numbers for emergency services in the local community.
- E. A peace officer is not civilly liable for noncompliance with subsection D of this section.
- F. An offense included in domestic violence carries the classification prescribed in the section of this title in which the offense is classified.
- G. If the defendant is found guilty of an offense included in domestic violence and if probation is otherwise available for such offense, the court may, without entering a judgment of guilty and with the concurrence of the prosecutor and consent of the defendant, defer further proceedings and place the defendant on probation as provided in this subsection. The terms and conditions of probation shall include those necessary to provide for the protection of the alleged victim and other specifically designated persons and additional conditions and requirements which the court deems appropriate, including any counseling or diversionary programs available to the defendant. On violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided for revocation of probation. On fulfillment of the terms and conditions of probation, the court shall discharge the defendant and dismiss the proceedings against the defendant. This subsection does not apply in any case in which the defendant has previously been found guilty under this section, or in which charges under this section have been previously dismissed in accordance with this subsection.

103. *Id.* at § 13.3601(G).

104. *See supra* notes 93, 98.

105. *A Model State Act, supra* note 84, at 137.

106. *See supra* text accompanying notes 72-73.

criminal cases.¹⁰⁶ There are some factors which make diversion appropriate in both spouse abuse cases and other criminal cases, but other factors exist precluding diversion in most criminal cases, although not necessarily precluding diversion's effectiveness in a spouse abuse case. Common among pretrial diversion programs is the requirement that the participant be a "nonhardened offender,"¹⁰⁷ or rather, a first-time or youthful offender. The first-time offender requirement is based on the public policy of avoiding risk to community safety during the diversionary period.¹⁰⁸ This requirement applies equally to domestic violence offenders. Repeat abusers, or at least those with prior convictions,¹⁰⁹ are often excluded from formal pretrial diversion programs.¹¹⁰ Other programs exclude defendants with a prior arrest for any violent crime.¹¹¹

Generally, pretrial diversion programs are based upon voluntary participation.¹¹² Although voluntary participation is needed to insure that the defendant's rights are not violated, it is not clear that diversion programs would be ineffective otherwise. "[Many] mental health practitioners believe that counseling is ineffective unless the client's participation is voluntary, [but] experience with court-mandated treatment for abusers suggests that the opposite may be true."¹¹³ It is characteristic of spouse batterers to deny responsibility for their abusive conduct, and to be unwilling to seek help.¹¹⁴ "Also, [abusers] are often more externally motivated [than other types of offenders] and do what is required of them more willingly than when they take steps by themselves to change their behavior."¹¹⁵ Few batterers seek treatment on their own, yet when counseling is ordered by a court, many are receptive to therapy.¹¹⁶ It appears that the coercive effect of the deferred prosecution may actually make batterers more responsive to counseling and rehabilitative programs by providing an external motivation. Regardless, voluntary participation remains a requirement of both statutory diversion programs¹¹⁷ and most model diversion statutes aimed at domestic violence cases.¹¹⁸

107. R. NIMMER, *supra* note 79, at 50.

108. MONOGRAPH, *supra* note 67, at 40.

109. It is an unusual case where the victim of spousal abuse resorts to arrest and prosecution after the first incident of violence.

110. MICH. COMP. LAWS ANN. § 769.4a(1) (West 1982); ARIZ. REV. STAT. ANN. § 13-3601(G) (Supp. 1986).

111. L. LERMAN, *supra* note 5, at 96.

112. MONOGRAPH, *supra* note 67, at 27.

113. L. LERMAN, *supra* note 5, at 110.

114. *Id.*

115. L. LERMAN, *supra* note 5, at 110 (citing A. Ganley & L. Harris, Domestic Violence: Issues in Designing and Implementing Programs for Male Batterers (Aug. 29, 1978) (unpublished paper presented to the American Psychological Association)).

116. L. LERMAN, *supra* note 5, at 110.

117. WIS. STAT. ANN. § 971.37(1m)(b) (West 1985); ARIZ. REV. STAT. ANN. § 13-3601(G) (Supp. 1986).

118. *A Model State Act*, *supra* note 84, at 136. *But see* Dreas, Ignator & Brennan, *The Male Batterer: A Model Treatment Program for the Courts*, 46 FED. PROBATION 50, 51 (1982).

B. *What Characteristics of an Individual Case Make It More or Less Appropriate for Diversion?*

Characteristics specific to domestic violence cases make some offenders particularly appropriate for diversion programs. Model statutes list some criteria to assist prosecutors in deciding which offenders are appropriate for diversion,¹¹⁹ but most statutes merely provide for prosecutorial or judicial discretion.¹²⁰ The model state act prepared by Lisa G. Lerman¹²¹ lists several eligibility criteria intended to guide prosecutors in determining who should be admitted to the diversion program.¹²² The model statute section provides that the prosecutor, after finding that the defendant fulfills all the mandatory requirements, shall assess whether the defendant is likely to complete the diversion program successfully.¹²³ The defendant's motivation to stop battering, and any other factors indicating that the defendant would benefit from counseling, should be considered.¹²⁴ It has been suggested that the idea of family unity alone is not reason enough to divert an offender, otherwise all domestic cases would be diverted. It may, however, be a strong motivating factor in the case of some batterers which will produce a greater likelihood that counseling will succeed in changing the abuser's violent behavior.¹²⁵ Thus, the very characteristic that makes prosecution more difficult¹²⁶ makes the case all the more appropriate for diversion. A defendant's desire to maintain a job so he may provide for himself and his family is another potential motivating factor.¹²⁷ The victim's consent, if not an eligibility requirement, should also be considered in assessing the defendant's likely success in a diversion program in recognition that the victim knows the batterer better than the prosecutor, and stands to lose the most if diversion is unsuccessful.¹²⁸ A victim's positive attitude toward diversion may be indicative of its potential success.

After considering the factors which may make pretrial diversion more appropriate for a particular offender, consideration must be given to those factors which weigh heavily against diverting a spouse batterer.

Lerman's model diversion statute also suggests factors pointing toward prosecution rather than diversion for the abuser.¹²⁹ If the injury inflicted

119. *A Model State Act*, *supra* note 84, at 136.

120. *See supra* text accompanying notes 93-104.

121. *A Model State Act*, *supra* note 84, at 136-37.

122. *Id.* at 137.

123. *Id.* at 136.

124. *Id.* at 137.

125. Waits, *supra* note 83, at 325.

126. The desire to maintain a family relationship is the cause of much case attrition.

L. LERMAN, *supra* note 5, at 19-20.

127. Waits, *supra* note 80, at 325.

128. *Id.* at 326.

129. *A Model State Act*, *supra* note 84, at 137.

upon the victim is severe, prosecution is the preferred choice.¹³⁰ Batterers charged with inflicting severe injuries should not be diverted, at least at the pretrial phase, because diversion does not send a strong enough message that their conduct is socially unacceptable.¹³¹ Additionally, if the victim discloses an extensive history of previous incidents of domestic violence by the defendant, diversion would be inappropriate for the same reason.¹³² Finally, if the defendant has a significant criminal record, this too weighs against diversion.¹³³ A defendant with a significant criminal record may be inappropriate for diversion, regardless of whether his prior crimes were acts of violence, because the defendant is "wise" to the criminal justice system.¹³⁴ This type of defendant may use the diversion program as an easy way out of the charge with no commitment to dealing with his violence.¹³⁵

As previously mentioned, victim consent is given weight in the eligibility determination. Because a battered spouse tends to minimize her assailant's actions, she should be believed when she indicates that diversion will not deter her partner's violence.¹³⁶ It would be rare for a victim to withhold consent in a case where a conscientious prosecutor seeks diversion.¹³⁷ Thus, opposition by the victim should be accorded great influence in the diversion determination. An additional factor which demonstrates that a particular defendant is not likely to benefit from diversion is whether the batterer has previously participated in counseling programs. If so, it demonstrates that counseling has not altered the behavior.¹³⁸ Consequently, those defendants must be assessed stiffer penalties for their violence in the hope that an increased penalty will increase motivation for change.¹³⁹

C. *External Factors That Must Be Considered in Determining if Pretrial Diversion of Spouse Abuse Cases Will Work*

Although the particulars of each domestic violence case must be considered in determining whether diversion will be effective in rehabilitating a certain defendant, many external factors are also important

130. *Id.*

131. Waits, *supra* note 83, at 325.

132. *A Model State Act*, *supra* note 84, at 137.

133. *Id.*

134. L. LERMAN, *supra* note 5, at 102.

135. *Id.*

136. Waits, *supra* note 83, at 326.

137. *Id.* at n.332.

138. *Id.* at 325.

139. *Id.*

when considering the potential success of a diversionary program. The largest concerns are with the attitude of the community toward domestic violence, the attitude of the prosecutors' offices, and the attitude of the police.

From the standpoint of the community, "consistent diversion of domestic violence cases to social services and private remedies communicates the message that domestic violence is a private matter, not a serious crime."¹⁴⁰ In a community where pretrial diversion programs have not been used with other criminal offenses, diversion of domestic abuse only perpetuates the idea that domestic violence is less criminal behavior than other offenses. This is a primary argument that diversion sanctions the underenforcement of the criminal law against spouse batterers.¹⁴¹ This argument, however, loses its force when other non-domestic criminal offenders, including other violent offenders, are treated similarly.

In addition to community attitudes, resources available in a given community are also a large determinant of a formal pretrial diversion program's success. Without appropriate social programs or agencies and funds to maintain such programs, there is no place to divert offenders. Diversion programs cannot be successful by merely channeling batterers away from prosecution. Alternative programs, such as private and group counseling, must be available to provide treatment and deterrence of the violent behavior.

The attitude of the police force is also a crucial determinant of success. If police are unresponsive to domestic disturbance calls, or unwilling to make arrests, the batterer will not become subject to any diversion program. At present, very few abuse calls lead to arrest.¹⁴² Increased arrests of spouse abusers sends a message to communities that such conduct is wrong and will not be tolerated,¹⁴³ and gives prosecution or diversion its desired effectiveness. To this end, police must be educated in the goals of the diversion program and its effectiveness so that they do not perceive their arrest efforts as wasted. A statutorily imposed duty to arrest in all domestic abuse cases where probable cause is present would provide a clear statement that arrest is the appropriate course of action.¹⁴⁴ This would combat the effect of traditional views held by police that domestic violence is not a serious crime, and would give a legislative push toward requiring arrests. Warrantless arrest provisions are also necessary to encourage arrests for misdemeanors committed outside the officer's presence.¹⁴⁵

140. Note, *supra* note 76, at 737.

141. *A Model State Act*, *supra* note 84, at 135.

142. *Id.* at 127.

143. *Id.*

144. *Id.*

145. *Id.*

The police, however, can only activate the legal process.¹⁴⁶ It is up to the prosecutor to initiate and ensure the success of diversion programs.¹⁴⁷ There are two actions a prosecutor can take that undermine any chance of a pretrial diversion program's success. The first is to use the diversion program as a dumping ground for all domestic cases.

Diversion may be appropriate in some cases, "but these programs should not be used merely as a device to reduce the caseload of 'minor disputes' without regard to the needs of the battered spouses, the offenders, and society's interest in the censure of domestic violence."¹⁴⁸ Not only does this fail to properly resolve the domestic violence problem and treat the conduct as truly criminal, it perpetuates the attitude that domestic violence is not a serious crime worthy of prosecution. This type of action also discourages the police from making proper arrests if those arrests are not given serious consideration for prosecution.

The second action a prosecutor can take that undermines the success of a diversion program is the failure to follow up unsuccessful diversion with the conditionally deferred prosecution. The most important safeguard in insuring the proper use of pretrial diversion is the prosecutor's staunch commitment to the reinstatement of charges if the batterer engages in violent conduct,¹⁴⁹ or is otherwise unsuccessful in the diversion program. "This commitment must be unequivocally communicated to the batterer so he knows counselling cannot be used to evade responsibility for his actions."¹⁵⁰ Careful supervision is essential, allowing immediate prosecution if the batterer fails to comply with the terms of the diversion program.¹⁵¹

IV. CONCLUSION

How can law enforcement officials treat spouse battering as criminal behavior, yet respect the familial relationship that exists between the batterer and his victim? This Note has suggested that formal pretrial diversion of spouse abuse cases is the solution to this dilemma. Informal diversion attempts at combatting the spouse abuse problem have not been successful in providing the necessary deterrence of the offender, or in communicating clearly to society that spousal abuse is a criminal offense.

As important as the initial attempts were in leading up to an effective solution, they did not provide a resolution. While formal pretrial diversion

146. Waits, *supra* note 83, at 321.

147. *Id.*

148. Note, *supra* note 76, at 737.

149. Waits, *supra* note 83, at 326.

150. *Id.*

151. Note, *supra* note 76, at 738.

appears at first impression to be just another way to avoid serious criminal prosecution of spousal violence, closer analysis indicates that the process may finally lead to the successful treatment and deterrence of violent behavior. Unlike earlier attempts made to distinguish domestic violence from similar crimes between strangers, formal pretrial diversion is an *appropriate* combination of criminal deterrence and punishment through prosecution with initial attempts at rehabilitating the offender who is willing to recognize and correct his violent behavior.

Admittedly, every community will not accept the diversion of such cases without perceiving that family violence is being treated in a noncriminal manner. However, given the proper environment in which police and prosecutors are willing to support a program, that message will not be communicated to the public. The prosecutors' unwillingness to use diversion as a dumping ground for spousal abuse cases, and a staunch commitment to reinstituting prosecution in unsuccessful diversion cases will protect the integrity of a formal diversion program in the eyes of the community, the victim, and the offender. Statutory eligibility requirements maintain consistent application of programs, while assuring that repeat offenders do not use the process to avoid criminal culpability for their actions.

Although violence between intimates is recognized as criminal behavior, the relationship that exists between the batterer and the victim cannot be ignored. Effective deterrence and treatment strategies are carried out on two fronts: through the legal system, and through social service agencies. Formal pretrial diversion provides a method to successfully combine both.

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